

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

DANIELLE CURRY, on her own behalf and ) Docket No. 15 C 9152  
as Special Administrator of the Estate )  
of CHRISTOPHER KELLY, deceased, )  
Plaintiff, )  
v. ) Chicago, Illinois  
OFFICER KYLE BURNS (Star #13310), ) September 7, 2016  
OFFICER KELIN ALTHOFF (Star #4163), ) 9:00 o'clock a.m.  
OFFICER CHRIS DIEBALL (Star #14889), )  
OFFICER MARK LACIVITA (Star #15136), )  
OFFICER VIRGINIA O'DONNELL (Star #5695), )  
OFFICER BRIAN RIX (Star #15065), )  
OFFICER MICHAEL KEY (Star #8813), )  
SGT. ANGELO MONACO (Star #1595), )  
OFFICER LILIAN ZEPEDA (Star #5920), )  
OFFICER JOYCE SHEAN (Star #10293), )  
OFFICER GABRIELLA CRUZ (Star #2844), )  
OFFICER ERICK GRADY (Star #17129), )  
OFFICER KEVIN HAWKINS (Star #13471), )  
OFFICER ERIC SEHNER (Star #11641), )  
OFFICER ADAM FITZGERALD (Star #7834), )  
and the CITY OF CHICAGO, a municipal )  
Corporation, )  
Defendants. )

TRANSCRIPT OF PROCEEDINGS - MOTION  
BEFORE THE HONORABLE JOHN Z. LEE

APPEARANCES:

For the Plaintiff: ERICKSON & OPPENHEIMER, LTD., by  
MS. RONAK P. MAISURIA  
223 West Jackson Boulevard  
Suite 200  
Chicago, Illinois 60606

ALEXANDRA ROTH, CSR, RPR  
Official Court Reporter  
219 South Dearborn Street  
Room 1224  
Chicago, Illinois 60604  
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1 APPEARANCES: (Continued)

2 For the Defendants:

CITY OF CHICAGO  
Department of Law, by  
MS. DANA MARIE PESHA  
MR. BRET ANTHONY KABACINSKI  
30 North LaSalle Street  
Suite 900  
Chicago, Illinois 60602

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1 (Proceedings had in open court:)

2 THE CLERK: 15 C 9152, Curry versus Does.

3 MS. MAISURIA: Good morning, your Honor. Ronak  
4 Maisuria for plaintiff.

5 MS. PESHA: Good morning. Dana Pesha, P-e-s-h-a, on  
6 behalf of defendants.

7 MR. KABACINSKI: Good morning, your Honor. Bret  
8 Kabacinski also for the defendants.

9 THE COURT: Good morning.

10 This is plaintiff's motion for leave to file third  
11 amended complaint instanter. Is there an objection to the  
12 motion?

13 MS. PESHA: Our concern, not to the -- not objection  
14 per se, your Honor. But there is a concern that it raises.  
15 This is now the fourth complaint adding another claim. And the  
16 last time that I was in front of your Honor you had raised the  
17 issue that there were 15 named officers, and if we could  
18 possibly cut that down as we move through discovery. That  
19 hasn't occurred.

20 We answered. We stated there is at least five  
21 officers that have no contact with plaintiff on the date of the  
22 incident. So we asked them to be dismissed. We still have to  
23 go through depositions on those. And as we quickly approach  
24 this fact discovery cutoff, we have 20 depositions scheduled.  
25 We have already taken about ten. And there is still some

1 discovery further down the pike.

2           So I just wanted to raise this with you as we're now  
3 moving on and adding additional claims.

4           MS. MAISURIA: Your Honor, we understand it's the  
5 third amended complaint. But unfortunately we did not receive  
6 information regarding spoliation issue until about mid to late  
7 July. At that time we did some research as to whether we  
8 wanted to bring a spoliation claim or perhaps ask for an  
9 adverse inference later down the road. We decided to go with  
10 the spoliation claim for right now.

11           I mean, this is not a claim we would have been able to  
12 bring at the second amended complaint or the first amended  
13 complaint. And while there are many officers named in this  
14 case, five of the 15 officers in written discovery have said  
15 that they -- they weren't present. But we would still like to  
16 take their depositions because they said they weren't -- didn't  
17 have contact with the decedent on the day, but they were still  
18 on the scene.

19           Once we take those depositions, if their stories  
20 remain consistent, we anticipate dismissing those defendants.  
21 But there are going to be at this point ten officers presumably  
22 defendants in this case. And there is no getting around the  
23 fact that despite a litigation hold being placed very early on,  
24 dash cam footage was purged because no hold was placed on that.  
25 And the hard drive wasn't properly removed, which would have

1 allowed for an expert to see whether that data could have been  
2 recovered.

3           So we have some serious spoliation issues here.

4           THE COURT: Talk to me a bit about the dash cam videos  
5 and the issues that counsel has raised.

6           MS. PESHA: So the legal hold came into the City of  
7 Chicago law department, and it was assigned to a paralegal to  
8 collect the information and preserve that information. She did  
9 not collect the dashboard cameras, from what I've been told,  
10 because she believed it was a foot chase, and the dash cameras  
11 would not have shown anything. She did not have car numbers.

12           When we were assigned the case in December, we saw  
13 that right away, raised the issue with her superiors and have  
14 worked through CPD to determine what else is there, what would  
15 have happened. And we're trying to get the GPS for the car  
16 that has the video that was purged to show where it was parked,  
17 to show what if anything it could have possibly shown. We have  
18 asked for discipline for that individual paralegal, and it  
19 was -- it went through HR, and that they are addressing it at  
20 this point.

21           With respect to the second car with the in-car camera  
22 with the hard drive, the tech went out to the car on the date  
23 of the incident. There were Windows errors, which meant that  
24 there was nothing on the hard drive. He did not remove it. He  
25 did a supplemental report stating that the Windows errors would

1 not have allowed them to even log in on the date of the  
2 incident.

3           And then what happened was, the last video that was on  
4 there was from August 13, which is about three weeks prior to  
5 the date of this incident. It was not removed. For some  
6 reason the detectives in the detective sup said that it was  
7 removed. It was not. As soon as the law department found out  
8 about this error, we contacted the technical services  
9 department. They have now removed the hard drive, and it is in  
10 evidence.

11           MS. MAISURIA: Your Honor, we had a consultant that we  
12 worked with in another cases that's familiar with the dash cams  
13 used by the Chicago Police Department. COBAN is the  
14 manufacturer. And he -- when we first got this case, I reached  
15 out to him. He informed me, there is a fail-safe system on  
16 there. So even if the camera says -- if the department looks  
17 into it and they think that the camera wasn't working for three  
18 weeks, it still -- there is a range where someone can go in and  
19 try to recover data that would appear not to be there but is  
20 actually in fact there.

21           And we would anticipate using him as an expert in the  
22 spoliation claim because he perhaps could have come in and seen  
23 whether this data could have been recoverable.

24           THE COURT: So let me ask you this: Just looking down  
25 the line here, thinking about summary judgment stage, okay,

1 when at this point do you think you are going to raise the  
2 spoliation issue? In other words, are you going to ask for an  
3 adverse inference to use with regard to any sort of summary  
4 judgment motions that defendants filed or that you decide to  
5 file? Or are you going to wait until trial? When do you  
6 foresee bringing that issue to the Court for the Court to  
7 decide?

8 MS. MAISURIA: Your Honor, unfortunately I am not in a  
9 position to answer that question because I haven't taken any  
10 officer depositions yet. We have scheduled most of them. And  
11 they are all scheduled at this point for October going into  
12 early November, based on counsel's scheduled. So until more  
13 discovery comes out through those depositions, I am not really  
14 in a position to say whether we would bring that up at summary  
15 judgment stage or later.

16 MS. PESHA: We will be presenting, your Honor, the  
17 officers who were in the vehicles on those days, as well as the  
18 technician that went out to collect the data, and the sergeant  
19 who's in charge of the information technology service.

20 MS. MAISURIA: I mean, when --

21 THE COURT: Just hold on for a second. The -- in my  
22 view, my preliminary thoughts are as follows: It seems to me  
23 that if at the end of discovery the defendants do wish to file  
24 some sort of summary judgment motion, to the extent the missing  
25 information is going to be relevant to the issues raised in

1 that motion, I would prefer to address that before the summary  
2 judgment motions are filed as opposed to part and parcel of the  
3 summary judgment motion, the basis being to the extent I am  
4 going to have to have a hearing and make credibility  
5 determinations, I like to do that before the parties spend a  
6 lot of time and money on summary judgment motions and framing  
7 issues that perhaps they may not need to frame. So keep that  
8 in mind as you go forward.

9           Perhaps one way to do that might be the -- I am just  
10 thinking out loud here, might be to do the summary judgments in  
11 phases, doing the spoliation claim first, before we do the  
12 other claims on the merits. But that's something to kind of  
13 think about, and we'll talk about that more when it comes down  
14 to it.

15           What about these other five officers? So what's the  
16 basis for initially naming them as part of this lawsuit?

17           MS. MAISURIA: We got the names off of police reports  
18 that were initially given to us when we sent out the subpoena  
19 after filing a John Doe complaint.

20           THE COURT: So the police report said that these  
21 officers were on the scene?

22           MS. MAISURIA: They said they were on the scene. And  
23 the reports that we got initially after filing the case and  
24 sending out a subpoena within weeks of the incident were --  
25 they weren't complete reports. So it -- they weren't clear as



1 to which officers had done what. We named them as defendants  
2 initially thinking they were the officers involved in the  
3 pursuit. They were present. They responded to the scene.  
4 They -- some of them went into the area where the decedent was.

5 We anticipate dismissing them out after we've taken  
6 their depositions and if that information continues to be  
7 consistent through discovery. But at this stage, I mean, just  
8 relying on an interrogatory answer we wouldn't want to dismiss  
9 them out and then re-add them if something else came out at the  
10 deposition.

11 THE COURT: I am just trying to get a sense of what  
12 else is out there with regard to these officers, other than the  
13 police reports. Or if there is anything specifically tying  
14 those five officers to the scene. So what were they -- what  
15 was their involvement?

16 MS. PESHA: So there is -- essentially it's a large  
17 scene, your Honor. There is the area on Harding between  
18 Ferdinand and Ohio and the street over which is I believe  
19 Springfield.

20 The initial encounter with the deceased is on  
21 Springfield by two officers. Then he runs from the police  
22 officers. One of the officers pursues. They call for  
23 assistance. There is additional officers that come onto  
24 Springfield to stay at Springfield, to stay with other  
25 individuals who were stopped. They do not pursue him. They

1 never see him, make no contact with him. They actually stay on  
2 Springfield.

3 And then additional officers respond on Harding. The  
4 ones who are on Harding, ten is the generous number of the  
5 individuals who either physically had contact with him or saw  
6 them, saw him interact with the officers. The other five never  
7 saw him. They stayed on Springfield.

8 MS. MAISURIA: Your Honor, that's according to the  
9 police version. We've had third-party witnesses deposed in  
10 this case already, who have indicated that there were female  
11 officers staying on Springfield as opposed to male officers the  
12 defendants are claiming stayed. None of the third-party  
13 witnesses have said there was a crowd of five officers that  
14 stayed at the initial scene. They only said it was one female  
15 officers.

16 So we have discrepancies in the information coming  
17 out, and we would like to fully get through discovery before  
18 making a determination as to which individual should no longer  
19 be defendant.

20 THE COURT: Okay. I mean, if there is a discrepancy  
21 amongst the witnesses that are deposed to date or witnesses  
22 that you have interviewed that provides you with a good-faith  
23 basis to believe that these others officers had further  
24 involvement or other knowledge with regard to the claims or  
25 defenses that are set forth, then discovery is fine. I am

1 assuming that even if they weren't named as defendants, you'd  
2 probably take their depositions anyway as third parties. So I  
3 don't think there is really much prejudice either way,  
4 particularly given where we are in discovery.

5           So let's talk about discovery. With regard to the  
6 spoliation claim, does the claim require any additional  
7 discovery other than what you are going to be taking?

8           MS. MAISURIA: No. Once I learned from Ms. Pesha what  
9 had occurred, I indicated to her that I wanted to take the  
10 depositions of those individuals. I'd like to take the  
11 deposition of the tech that went out, the sergeant that was  
12 involved, and at this point the paralegal. I don't think at  
13 this point that we would be taking any additional depositions  
14 for that claim beyond those three.

15           THE COURT: Okay. So let's talk about the discovery  
16 deadline, currently the discovery deadline of October 6. You  
17 said that as of now, the deposition is scheduled to go out  
18 through early November, is that correct?

19           MS. MAISURIA: That's correct. I raised the issue of  
20 filing a motion, a joint motion, for an extension of discovery  
21 with Ms. Pesha probably three or four weeks ago, and she  
22 indicated that she was agreeable to that but wanted to explore  
23 how much time would be necessary to ask for. And we had not  
24 yet agreed on a timeframe. At this point we scheduled all the  
25 defendants' depositions. I think the last deposition date on

1 that front is November 3. But there is probably seven to eight  
2 third-party witnesses that still need to be deposed as well,  
3 one of whom has proven very difficult for either side to track  
4 down. And I would consider her a crucial witness.

5 So I think we are going to need, I would say, anywhere  
6 from 60 to 90 additional days.

7 MS. PESHA: We would agree with that.

8 THE COURT: Well, this is what I'd like you to do: Go  
9 ahead and meet and confer and provide me with a joint schedule  
10 setting forth all dates for all of the depositions between now  
11 through November, and the ones that need to be taken. To the  
12 extent that there is going to be this third party, you can tell  
13 me why you think that person is critical and why I should leave  
14 discovery open to take that particular deposition. But I am  
15 not going to leave discovery open just carte blanche to deal  
16 with that one witness. Okay? So you can go ahead and file the  
17 appropriate motion at that time.

18 So the plaintiff's motion to file third amended  
19 complaint to add a spoliation claim is granted. When can you  
20 file your answer?

21 MS. PESHA: Fourteen days, your Honor?

22 THE COURT: That's fine. So defendants' answer filed  
23 by September 21.

24 When is our next status in this case?

25 MS. PESHA: September 20.

1 THE COURT: Let's move that out. Let's go ahead, I  
2 will strike that date. Let's move it out to the week of  
3 October 17.

4 THE CLERK: October 20 at 9:00 o'clock.

5 THE COURT: If you are going to file a motion, file it  
6 and notice it up for that day.

7 MS. MAISURIA: Thank you.

8 MS. PESHA: Thank so much.

9 MR. KABACINSKI: Thank you.

10 (Which were all the proceedings heard in this case.)

11 CERTIFICATE

12 I HEREBY CERTIFY that the foregoing is a true, correct  
13 and complete transcript of the proceedings had at the hearing  
14 of the aforementioned cause on the day and date hereof.

15

16 /s/Alexandra Roth

9/26/2016

17 \_\_\_\_\_  
18 Official Court Reporter  
19 U.S. District Court  
20 Northern District of Illinois  
21 Eastern Division

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Date

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